United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

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74-2084

To be argued by
EDWARD R. KORMAN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2084

UNITED STATES OF AMERICA, ex rel. JULIO JUVENTINO LUJAN, on the petition of FRANK A. LOPEZ,

Petitioner-Appellant,

—against—

WARDEN LOUIS GENGLER, Superintendent Federal Detention Headquarters, New York City, HON. DAVID G. TRAGER, United States Attorney for the Eastern District of New York, and any other person having custody and control of the relator,

Respondents-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX FOR THE APPELLEE

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BRIEF FOR THE APPELLEE

Preliminary Statement

The petitioner-appellant, Julio Juventino Lujan, appeals from a judgment of the United States District Court for the Eastern District of New York (Mishler, *Ch. J.*), entered June 24, 1974, which dismissed without a hearing his pre-trial petition for a writ of habeas corpus (App. *infra*, 17a). Petitioner-appellant is presently incarcerated in the Federal Detention Headquarters in New York City and is awaiting trial on an indictment charging him with conspiring to import large quantities of heroin into the United States (Pet. App., 12a). The petition for a writ of habeas corpus sought the discharge of petitioner-appellant from custody and an order directing his return to Argentina, on

the ground that "his presence in the United States of America was secured by fraud, duplicity, and other unlawful means and in violation of the international treaties and obligations of the United States in violation of Article VI, Clause 2 of the United States Constitution, as decided by *United States* v. *Toscanino,* [500 F.2d 267 (C.A. 2)]" (Pet. App., 4a-5a).

Statement of Facts

On July 19, 1973, petitioner-appellant Julio Juventino Lujan was indicted by a grand jury empanelled in the Eastern District of New York. The petitioner-appellant, along with eight other co-defendants, was charged with conspiracy to import a large quantity of heroin into the United States and conspiracy to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of the heroin after the heroin entered the United States (Pet. App. 12a). On the same day in which the indictment was returned, July 19, 1973, a warrant was issued which "commanded" any "Special Agent of the Drug Enforcement Administration" or any "United States Marshal or any Deputy United States Marshal" to arrest Julio Juventino Lujan and bring him forthwith before the United States District Court for the Eastern District of New York to answer [the] indictment" (App. *infra,* 18a-19a).

On November 2, 1973, petitioner-appellant was arraigned on the indictment and entered a plea of not guilty. The allegations regarding the manner in which petitioner-appellant was apprehended, which formed the basis of his application for a writ of habeas corpus in the district court, were contained originally in a motion to dismiss the indictment and were supplemented by an offer of proof on the oral argument of that motion (App., *infra* 1a-11a). Although the district court granted the motion to dismiss the indictment because of the failure of the United States to deny the allegations relating to petitioner's apprehension,

the district court (on consent of both parties) later vacated the order of dismissal on the ground that the validity of the indictment (which was obtained prior to the arrest of petitioner-appellant) could not be affected by the manner in which he had been apprehended.

On the assumption that the appropriate pre-trial remedy was a petition for a writ of habeas corpus, petitioner-appellant proceeded to file such an application. In substance, it incorporated the allegations of the earlier motion to dismiss (as supplemented by the offer of proof made at the hearing on that motion). Petitioner-appellant alleged that (Pet. App. 8a-10a):

> (a) On or about October 26th, 1973, the defendant Lujan flew an airplane on a chartered flight from Argentina into Bolivia. This was a legal flight with flight clearance given by Argentine and Bolivian authorities. The flight was arranged by American Agents who lured Lujan to fly from Argentina into Bolivia under the pretext of flying a passenger who had business with American interests in Bolivian mines. On arrival in Bolivia, Bolivian police placed Lujan in custody without formal charge of any kind. He was not permitted to communicate with the Argentine Embassy, an attorney, or any member of his family. The Bolivian police compromised did not have lawful mandate from their own law enforcement authorities to effect the detention of Lujan. They were in effect bribed by American agents.
>
> (b) On or about October 27th, 1973, Lujan was taken by the Bolivian armed police from Santa Cruz, Bolivia to LaPaz, Bolivia without his consent and under the threat of force and again held incommunicado. In charge of this operation was Major Guido Lopez of the Bolivian Police, who at times during the Lujan detention skirted his own police lest inquiry be made reference Lujan.

(c) On or about November 1st, 1973, Lujan was then taken by Bolivian Police (Lieutenant Terrazas and American C.I.A. agents or operatives) in Bolivia to the airport where he was f[illegible]ibly abducted and placed on an airplane and taken to New York.

(d) On or about November 2nd, 1973, Lujan arrived at Kennedy Airport in Queens, New York, within the Eastern District of New York and was thereafter formally arrested and charged for the first time by additional Federal Agents who were waiting for him.

(e) It is also clear on information and belief that United States Law Enforcement Officers acting covertly with the Bolivian Police were able to abduct Lujan, a national of a third country, Argentina, without any lawful intervention, to wit, formal charge by the Bolivian Police, formal charge and extradition by the United States Authorities, and the arrival of Lujan in New York City was a gross act of International banditry in which the United States participated with the bribed police of a second country acting ultra vires to abduct the foreign national of a third country in violation of its treaties with Argentina and Bolivia, and the agreements set forth by the Organization of American States (OAS).

Petitioner-appellant made clear, however, that (App., *infra*, 10a):

* * * Lujan's allegations and the thrust of his application doesn't involve either the torture or terror we find in Toscanino and doesn't involve, to our knowledge at this time, any electronic wiretapping or eavesdropping, illegal or otherwise. We make no such allegation. We have no facts of that.

> Thirdly, your Honor, as far as Lujan is concerned, we make no claim as far as custodial interrogation of any kind—those long hours of interrogation that were the fact pattern, at least, on affidavit, in Toscanino.
>
> The thrust of Lujan's application is the deceit and trickery to lure him to Bolivia—the United States' plan and the cooperation between the Bolivian police and the American operatives.

The district court, which had granted the earlier motion to dismiss solely because of its belief that an appeal in this case "might very well help fix the parameters of [*United States* v.] *Toscanino*, [500 F.2d 267 (C.A. 2)]" (App. *infra*, 11a), dismissed the petition for a writ of habeas corpus without a hearing. And, it is that order from which the petitioner-appellant appeals.

ARGUMENT

The petition for a writ of habeas corpus was properly denied.

I. Introduction and Summary

1. Until the holding of a three-judge panel in *United States* v. *Toscanino*, 500 F.2d 267 (C.A. 2, 1974), it was settled law in this Circuit, and elsewhere, that the power of the district court to try a person was not impaired by the fact that he had been brought within the district court's jurisdiction by forcible abduction. *United States* v. *Sobell*, 244 F.2d 520 (C.A. 2, 1957), certiorari denied, 355 U.S. 873; *United States ex rel. Moore* v. *Martin*, 273 F.2d 344 (C.A. 2, 1959); *United States ex rel. Burgett* v. *Wilkins*, 283 F.2d 306 (C.A. 2, 1960); *LaFranca* v. *Immigration and Naturalization Service*, 413 F.2d 686 (C.A. 2, 1969). Indeed, in *United States ex rel. Orsini* v. *Reincke*, 286 F. Supp. 974

(D. Conn. 1968), affirmed on the opinion below, 397 F.2d 977 (C.A. 2, 1968), certiorari denied, 393 U.S. 1050 (1960), the district court held that the "rule that an illegal arrest without more does not void a conviction and is not a ground for a collateral attack by habeas corpus is well established whether the conviction was by a federal * * * or a state court" and that it does not matter "how grossly illegal the arrest may have been" (286 F. Supp. 974). Moreover, the district court went on to hold (286 F. Supp. 977-978):

> In testing whether "due process of law is satisfied," *Frisbie* v. *Collins*, 342 U.S. at 522, 72 S.Ct. at 512, concern is only with constitutional violations which have a prejudicial effect upon the guilt determining process at the trial. The relationship between the remote concept of an illegal arrest and a later conviction of the arrestee at a trial is established only when there is a functional link between the two. It is not the rupture of a defendant's privacy—whether of his home, or his person—but the use of the fruits of that unconstitutional intrusion to obtain his conviction that is forbidden, e.g. the admission at the trial of evidence obtained by an unlawful search and seizure. *Mapp* v. *Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed. 2d 1081 (1961). See also, *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed. 2d 1503 (1958) (narcotics seized under an invalid warrant); *Aguilar* v. *Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed. 2d 723 (1964) (narcotics); *Beck* v. *Ohio*, 379 U.S. 89, 85 S.Ct. 223, 13 L.Ed. 2d 142 (1964) (betting slips). However, if evidence of a defendant's guilt obtained as a result of an unconstitutional search or arrest was not introduced at his trial, there is no ground for assailing its fairness under due process standards, for the illegal seizure has had no prejudicial effect in the determination of his guilt.

In affirming this order denying Orsini's petition for a writ of habeas corpus, the panel (which was composed of Judges Smith, Kaufman and Hays) wrote (397 F.2d 977): "We affirm the judgment on the grounds given in [the district court's] thorough and reasoned opinion." Moreover, in *Johnson* v. *Louisiana*, 406 U.S. 356 (1971), likewise ignored by the majority in *United States* v. *Toscanino*, the Supreme Court adopted an approach essentially the same as that in *Orsini* (406 U.S. at 365). Accord: *United States* v. *Turner*, 442 F.2d 1146, 1148, n. 1 (C.A. 8, 1971).

2. In *United States* v. *Toscanino*, 500 F.2d 267 (C.A. 2), without the benefit of a hearing *en banc*, the panel (composed of Judges Mansfield, Oakes, and Anderson) ignored altogether the reasoning which had been reaffirmed only a few years earlier, and held that the Due Process Clause was offended by the manner in which the defendant had been brought within the jurisdiction of the district court. Relying on *Mapp* v. *Ohio*, 367 U.S. 643 (1960) and *Rochin* v. *California*, 342 U.S. 165 (1952), the panel in *Toscanino* held that these "decisions unmistakably contradict [the Supreme Court's pronouncement in *Frisbie* v. *Collins*, 342 U.S. 519, 522] that 'due process of law is satisfied when one present in court is convicted of a crime after being fairly apprized of the charges against him and after a fair trial in accordance with constitutional procedural safeguards'" (500 F.2d 274).*

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* *Mapp* v. *Ohio*, 367 U.S. 643 (1960), had already been decided when the panel in *Orsini* adopted the reasoning of the district court's opinion. Of course, *Rochin* v. *California*, 342 U.S. 165 (1952), was decided even before *Frisbie* v. *Collins*, 342 U.S. 519 (1952), and the reasoning of the panel that *Rochin* "unmistakably contradict[s]" the holding in *Frisbie* is, at the very least, difficult to understand. Indeed, *Rochin* itself has been undermined; and "the 'shock the conscience' test of *Rochin* * * * has not been favored by the Supreme Court." Weinreb, *Criminal Process*, p. 323 (Foundation Press, 1974, 2nd ed.).

The panel in *United States* v. *Toscanino*, *supra*, also held that the manner in which the defendant had been apprehended violated the United Nations Charter and the Charter of the Organization of American States, and that, in any event, the supervisory powers which it exercised over the administration of justice extended to the creation of sanctions to "remedy abuses of a district court's process." The panel, relying on cases in the field of civil procedure, stated that "a federal court's criminal process is abused or degraded where it is executed against a defendant who has been brought into the territory of the United States by the methods alleged here" (500 F.2d 276).

3. Although we continue to adhere to the view detailed in our petition for rehearing *en banc* in *United States* v. *Toscanino* that that case was decided wrongly, we believe that the "totality of the circumstances" which moved the panel in *Toscanino* to find a due process violation and to invoke its supervisory powers is so materially different here than in *Toscanino*, that a different result is warranted. We acknowledge, however, our inability to distinguish the facts here from those in *Toscanino* with regard to that portion of the panel opinion which additionally sustained the holding there on the basis of a violation of the United Nations Charter and the Charter of the Organization of American States.

The allegations here are almost identical to those in *United States* v. *Sobell*, 244 F.2d 520 (C.A. 2, 1957), certiorari denied, 355 U.S. 873, where the defendant alleged that he was "assaulted and 'kidnapped' by Mexican Security Police, as agents of or instigated by the Federal Bureau of Investigation; and brought to Laredo, Texas, without any formal deportation proceedings, which we are told are elaborate and technical and always observed with meticulous care by Mexican authorities" (244 F.2d at 523). Although it was held in *Sobell* that these allegations, if true, would not constitute a treaty violation or affect the jurisdiction of

the district court, the panel in *United States* v. *Toscanino* plainly intimated that *Sobell* would not be decided the same way today; it distinguished *Sobell* on the sole ground that the defendant there did not raise the issue whether the United Nations Charter or the Charter of the Organization of American States, which were both in effect at the time, had been violated (500 F.2d 279).

We respectfully submit that this third alternative basis for the holding in *Toscanino*—based on the alleged violation of the United Nations Charter and the Charter of the Organization of American States—which was rejected even by Judge Anderson who concurred in the result *, is so plainly erroneous that it should be regarded as dictum and not followed further. As Judge Mulligan observed in his opinion (joined by Judge Timbers), dissenting from the denial of the petition for rehearing *en banc* in *Toscanino*:

> "Finally, the majority holds that *Toscanino*, the foreign national, was personally clothed with the protection of the Charter of the United Nations and the Charter of Organization of American States. This is not only unprecedented but, if it is not

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* Judge Anderson wrote (500 F.2d at 281-282):

> Further, defendant did not enter this country pursuant to any treaty; he is, therefore, not "clothed" in any treaty rights and cannot invoke the extradition treaty or the charters of the Organization of American States and the United Nations as personal defenses, United States v. Sobell, 142 F.Supp. 515 (S.D. N.Y. 1956) (Kaufman, Judge), aff'd 244 F.2d 520 (2 Cir.), cert. den. 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed. 2d 77 (1957). Violation of the standards laid down by these treaties is again indicative of the denial of due process, but not a defense in and of itself. By and large treaties are to be enforced by governments, rather than by their individual citizens, and neither the United States, Uruguay nor Brazil contemplated that, under these circumstances, a defendant could personally seek to invoke these treaties.

contrary to our holding in *United States* v. *Sobell*, 244 F.2d 520 (2d Cir.), *cert. denied*, 355 U.S. 873 (1957), it is at least fissiparous."

While we thus urge that the panel here follow the views expressed by three of the five active and senior judges who spoke to this issue in *Toscanino*, and who would hold that the defendant in *Toscanino* was not clothed with any treaty rights and cannot invoke the charters of the Organization of American States and the United Nations as personal defenses, we also submit that the panel in *Toscanino* erred in concluding that those two treaties have been violated by the kind of conduct alleged here, in *Sobell* and in *Toscanino* and that this affords an additional basis for this panel to decline to follow the dictum in *Toscanino*.

II. The Totality of the Circumstances Distinguish This Case From *United States* v. *Toscanino*

Petitioner-appellant's allegations like those of the defendant in *United States* v. *Toscanino*, *supra*, may properly be divided into two parts. First, petitioner-appellant complains he was improperly lured by ruse into leaving Argentina and flying to Bolivia. Second, he claims he was improperly arrested by Bolivian police, allegedly acting in violation of the laws of their own country and at the behest of the United States, who proceeded to place him on a plane to New York. In both these respects, however, the facts are materially different from those in *Toscanino*.

1. Whereas the defendant in *Toscanino* alleged (500 F.2d at 269) that he was lured into a trap by Uruguayan police, who "in full view of Toscanino's [pregnant] terrified wife . . . knock[ed] him unconscious with a gun and [threw] him into the rear seat of [a] car" and drove him to the Brazilian border against his will (all allegedly in violation of Uruguayan law and at the behest of the United States), petitioner-appellant here alleges only that he was lured by a ruse to fly from Argentina to Brazil. But, whatever may be said

of the manner in which the defendant in *Toscanino* was allegedly taken from Uruguay to Brazil, the Supreme Court has reiterated that "[a]rtifice and strategem may be employed to catch those engaged in criminal activity" (*Sorrells* v. *United States*, 287 U.S. 435, 442 (1932)) and that "[c]riminal activity is such that stealth and strategy are necessary weapons in the arsenal of the police officer." *Sherman* v. *United States*, 356 U.S. 369 (1958). Indeed, only recently in *United States* v. *Russell*, 411 U.S. 423, the Supreme Court, held that the "mere fact of deceit [will not] defeat a prosecution, see, e.g. *Lewis* v. *United States*, 385 U.S. 206, (1966), for there are circumstances where the use of deceit is the only practicable law enforcement technique available." In that case, which was cited by the panel in *Toscanino* for the proposition that "'some day'" a situation would arise "'in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction'" (500 F.2d 274), the Supreme Court held that such a case was not presented where an undercover agent induced the defendant to produce an illicit drug and provided him with an essential ingredient of the drug which was difficult to obtain. The Supreme Court rejected the claim that the law enforcement conduct violated "'fundamental fairness, [and was] shocking to the universal sense of justice'" (*United States* v. *Russell*, 411 U.S., 426, 432 (1973)); and it also rejected the invitation to exercise its supervisory powers to create a defense based upon the use of "overzealous law enforcement techniques" (411 U.S. 435):

> Several decisions of the United States district courts and courts of appeals have undoubtedly gone beyond this court's opinions in *Sorrells* and *Sherman* in order to bar prosecutions because of what they thought to be for want of a better term "overzealous law enforcement." But the defense of entrapment enunciated in those opinions was not intended to

> give the federal judiciary a "chancellor's foot" veto over law enforcement practices of which it did not approve. The execution of the federal laws under our Constitution is confined primarily to the Executive Branch of the Government, subject to applicable constitutional and statutory limitations and to judicially fashioned rules to enforce those limitations. We think that the decision of the Court of Appeals in this case quite unnecessarily introduces an unmanageably subjective standard which is contrary to the holdings of this Court in *Sorrells* and *Sherman*.

The holding in *Russell*, and the other cases cited above, are even more compelling here. Unlike those cases, the deception that was employed here was merely intended to obtain the custody of the defendant to answer an indictment which was outstanding; the entrapment cases, on the other hand, actually involved the prosecution of a defendant for a crime which he was tricked into committing. Accordingly, it is plain that the ruse by which petitioner-appellant was lured from Argentina to Bolivia, does not violate the Due Process Clause or justify the exercise by the federal judiciary of "'a chancellor's foot' veto over law enforcement practices of which it [does] not approve."

2. The second prong of petitioner-appellant's plea for habeas corpus relief is likewise materially different from that of the defendant in *Toscanino*. There the defendant alleged that after he arrived in Brazil he was held incommunicado for eleven hours and was denied food and water; moreover he claimed that for "seventeen days [he] was incessantly tortured and interrogated'" (500 F.2d at 270). The defendant in *Toscanino* further alleged (id.):

> . . . [Toscanino's] captors denied him sleep and all forms of nourishment for days at a time. Nourishment was provided intravenously in a manner precisely equal to an amount necessary to keep him alive.

> Reminiscent of the horror stories told by our military men who returned from Korea and China, Toscanino was forced to walk up and down a hallway for seven or eight hours at a time. When he could no longer stand he was kicked and beaten but all in a manner contrived to punish without scarring. When he would not answer, his fingers were pinched with metal pliers. Alcohol was flushed into his eyes and nose and other fluids . . . were forced up his anal passage. Incredibly, these agents of the United States government attached electrodes to Toscanino's earlobes, toes, and genitals. Jarring jolts of electricity were shot through his body, rendering him unconscious for indeterminate periods of time but again leaving no physical scars.
>
> "Finally on or about January 25, 1973 Toscanino was brought to Rio de Janeiro where he was drugged by Brazilian-American agents and placed on Pan American Airways Flight #202 destined for the waiting arms of the United States government. On or about January 26, 1973 he woke in the United States, was arrested on the aircraft, and was brought immediately to Thomas Puccio, Assistant United States Attorney.

In contrast to these allegations, petitioner-appellant's counsel made it plain that his allegation "doesn't involve either the torture or terror we find in Toscanino" and that he made "no claim of custodial interrogation of any kind — those long hours of interrogation that were the fact pattern, at least, on affidavit, in Toscanino" (App, *infra*, p. 10a). The "thrust of Lujan's application" regarding the Bolivian aspect of his journey to the United States was simply "the

cooperation between the Bolivian police and the American operatives" in violation of Bolivian law (App. *infra*, 10a).

This allegation amounts to no more than the rejected claim in *United States* v. *Sobell*, *supra*, that the United States "agents" who affected his arrest in Bolivia violated local law to do so. Since a warrant of the district court had issued upon an indictment charging petitioner-appellant with a serious offense against the laws of the United States, he had no legal right to be free from the custody of United States law enforcement officials; the fact that his apprehension violated local law can hardly be said to be so shocking to the "universal sense of justice" or "so outrageous", that "due process principles would absolutely [effectively] bar the government from invoking judicial process to obtain a conviction (*United States* v. *Russell*, *supra*, 411 U.S. at 431).* As the Supreme Court held in *In re Johnson*, 167 U.S. 120, 126:

> The law will not permit a person to be kidnapped or decoyed within the jurisdiction for the purpose of being compelled to answer to a mere private claim, but in criminal cases the interests of the public override that which is, after all, a mere privilege from arrest.

This principle has not been eroded. On the contrary as Judge Kaufman observed in *United States* v. *Sobell*, *supra*, 142 F. Supp. 524, referring to this language in *In Re Johnson*, "[t]his principle has been followed again and again, in case after case involving charges of illegal abduction of a criminal defendant from another State or country."

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* Compare *Irvine* v. *California*, 347 U.S. 128 (1954) where the Supreme Court concluded that its conscience was not shocked by repeated illegal, surreptitious entries into the petitioner's home and installation in the bedroom and elsewhere of eavesdropping devices; see, also, *United States ex rel. Gibbs* v. *Zelker*, 496 F.2d 991, 993, n. 4 (C.A. 2, 1974), where it was strongly suggested that the violation of state law in effectuating an arrest was not a defect of constitutional dimension.

Of course, here again, assuming arguendo some violation of Bolivian law or even Section 1201(a) of Title 18, the entrapment cases (and other related cases) are particularly instructive in establishing that petitioner-appellant would not be entitled to the relief he seeks.* As Judge Friendly observed in *United States* v. *Archer*, 486 F.2d 670, 675 (C.A. 2, 1973):

> From *Casey* v. *United States*, 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632 (1928) decided two months before *Olmstead*, to *Russell* v. *United States*, 411 U.S. 423, 92 S.Ct. 1637, 36 L.Ed. 2d 366 (1973), decided this year, the Court has steadfastly refused to rule that governmental participation in a crime necessarily vitiates the conviction of private individuals who took part in committing the offense.

Moreover, in discussing the oft-quoted passage from Mr. Justice Brandeis dissent in *Olmstead* v. *United States*, 277 U.S. 438 (1928), Judge Friendly wrote in *Archer* (486 F.2d at 675):

> Justice Brandeis' statement is eloquent but his view, taken in full breadth, has never commanded the support of a majority of the Supreme Court. In *Olmstead* itself this portion of his dissent was joined only by Mr. Justice Holmes and Mr. Justice Stone. While the first ground of the dissent, namely, that warrantless wiretapping violates the Fourth Amendment, 277 U.S. at 471-479, 48 S.Ct. 564, has since been vindicated, *Katz* v. *United States*, 389 U.S. 347, 88 S.Ct. 507, 10 L.Ed. 2d 576 (1967), there has been no corresponding adoption of the second, based on the criminality of the acts of the Government agents under the laws of the State of Washington, 277 U.S. at 479-480, 48 S.Ct. 564.

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* Although there is some suggestion in *United States* v. *Toscanino*, *supra*, 500 F.2d 276, that the Federal Kidnapping Act (18 U.S.C. § 1201(a)) may have been violated there, we do not

[Footnote continued on following page]

Accordingly, it is submitted that the facts here, unlike the shocking allegations of Toscanino's treatment in Brazil, plainly do not give rise to a violation of the Due Process Clause, nor do they provide any more basis for the invocation of the supervisory powers than did the challenged conduct in *United States* v. *Sobell*, *supra*, or *United States* v. *Russell*, *supra*. See, also, *United States* v. *Cotten*, 471 F.2d 744, 748, n. 11 (C.A. 9), *certiorari denied*, 411 U.S. 936.

III. The Charters of the Organization of American States and the United Nations do not Afford Any Basis for the Relief Requested

The one portion of *United States* v. *Toscanino*, *supra*, from which the instant case cannot be distinguished is that which was based upon an alleged violation of the charters of the United Nations and the Organization of American States. The provisions of these treaties which were allegedly violated are: (1) Art. 2, paragraph 4 of the United Nations Charter which obligates "All Members" to "refrain

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understand on what basis Section 1201(a) can be said to have been violated by the seizure of petitioner-appellant for the purpose of transporting him to the United States to answer an indictment pending against him. Section 1201(a) was intended by "Congress . . . to prevent transportation in interstate or foreign commerce of persons who were being unlawfully restrained in order that the captor might secure some benefit to himself." *Gooch* v. *United States*, 297 U.S. 124, 128. Here, when petitioner-appellant was "restrained" and "transported in interstate or foreign commerce", it was solely for the lawful purpose of arresting him and bringing him to district court to answer an indictment charging him with a serious offense; it would indeed, be a strained interpretation of Section 1201(a) to hold that it had been violated by such conduct. Compare *United States* v. *Russell*, *supra*, where the Supreme Court held that the undercover agent, who conspired to produce an illicit drug and provided an essential and difficult to obtain ingredient for its production, did not "violate any federal statute or rule or commit any crime" (411 U.S. 430).

from the treat or use of force against the territorial integrity or political independence of any state . . .'; and (2) the Organization of American States Charter which provides that the "territory of a State is inviolable; it may not be the object, even temporarily . . . of . . . measures of force taken by another state, directly or indirectly, on any grounds whatever . . ." (500 F.2d at 277).

We respectfully submit that this part of the holding in *United States* v. *Toscanino*, *supra*, which was in fact rejected by three of the five judges who had occasion to discuss it, is so plainly erroneous that it should be regarded as dictum which this panel is not obligated to follow.

1. Although the threshold issue is whether the conduct alleged here can reasonably be characterized as the use of "force" against Bolivia, within the meaning of the Charter of the United Nations and the Organization of American States, we address ourselves at the outset to issue on which the panel in *United States* v. *Toscanino* divided, i.e. whether assuming such a violation petitioner has standing to complain of this violation and obtain any relief thereunder.

In *United States* v. *Rauscher*, 119 U.S. 407 (1886), the Supreme Court, quoting from its "fully considered" opinion in *Head Money Cases*, 112 U.S. 580 (1884)—discussed the circumstances under which an individual would have standing to obtain any relief arising out of a violation of a treaty (119 U.S. 418-419):

> A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all

> this the judicial courts have nothing to do and can give no redress. *But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country.* * * * * The Constitution of the United States places such provisions as these in the same category as other laws of Congress, by its declaration that this Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land. *A treaty, then, is a law of the land, as an act of Congress is, whenever its provisions prescribe a rule by which the rights of the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute.*

It is plain that the two charger provisions relied upon by the majority are of the kind with which "the judicial courts have nothing to do and can give no redress." They do not either expressly or by implication purport to "prescribe a rule by which the rights of the private citizen or subject may be determined." And it is this fact that distinguishes this case from the cases such as *United States* v. *Rauscher*, 119 U.S. 407 (1886), which involved a violation of a treaty of extradition that specifically prescribed the charges upon which a person extradicted pursuant to it could be tried, and *Cook* v. *United States*, 288 U.S. 102 (1933), which involved the violation of a treaty which specifically "fixed the conditions under which a [British] 'vessel may be seized and taken intó a port of the United States * * * for adjudication in accordance with' applicable law" * * * (288

U.S. 102, 121). Indeed, this distinction was recently recognized in *Fiocconi* v. *Attorney General of the United States*, 462 F.2d 475 (C.A. 2), *certiorari denied*, 409 U.S. 1059 (1972), where it was held that an express agreement between the United States and a foreign government, pursuant to which an individual is surrendered stand trial for a particular offense stands on the same plane as an extradition treaty and was subject to enforcement by the Judicial Branch; distinguishing such a cases from a case like the instant case or *United States* v. *Sobell, supra*, Judge Friendly, acknowledged the settled "body of case law indicating that the infringement of a foreign nation's sovereignty which results from unlawful seizure and abduction of persons or property from the foreign nation's territory by American agents, is not cognizable in a federal court and does not effect its jurisdiction over the person or property. See, e.g., *The Richmond*, 13 U.S. (9 Cranch) 102, 3 L.Ed. 670 (1815) (property); *The Merino*, 22 U.S. (9 Wheat.) 391, 402-403, 6 L.Ed. 118 (1824) (property); *United States* v. *Unverzagt*, 299 F. 1015, 1016-1017 (W.D. Wash. 1924), aff'd sub nom. *Unverzagt* v. *Benn*, F.2d 492 (9 Cir.), cert. denied, 269 U.S. 566, 46 S.Ct. 24, 70 L.Ed. 415 (1925) (person); *United States* v. *Sobell*, 142 F. Supp. 515, 523 (S.D.N.Y. 1956), aff'd 244 F.2d 520 (2 Cir.), cert. denied, 355 U.S. 873, 78 S.Ct. 120, 2 L.Ed. 2d 77 (1957) (person); cf. *Ker* v. *Illinois, supra*, 119 U.S. at 444, 7 S.Ct. 225."*

2. Moreover, we respectfully submit, there is little in the way of support for the construction that the panel in *Toscanino* placed upon the specified provisions of the Organization of American States Charter and the United Nations Charter. These provisions appear to do little more than prohibit "force" against member States; quite plainly the allegations here cannot be described as the use of

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* *Fiocconi* v. *Attorney General of United States, supra*, 462 F.2d 480 n.9.

"force" against the territory of Bolivia. The *Eichmann* case, cited by the majority in *Toscanino* (500 F.2d at 277), affords no support for the claim that Art. 2, Par. 4, of the United Nations Charter was violated by the activities of Israeli agents which brought to justice a mass murderer. Neither the Argentine complaint or the United Nations resolution condemning Israel even alluded specifically to that provision. Indeed, the resolution declared only "that acts such as that under consideration, which affect the sovereignty of a member State and therefore cause international friction, may if repeated endanger international peace and security". Whitman, *Digests of International Law*, Vol. 5, pp. 211-212.*

While it is true, as the majority opinion in *Toscanino* stated (500 F.2d at 278, that the resolution "requested" Israel "to make appropriate reparation in accordance with the Charter of the United Nations and rules of international law", this apparently referred merely to procedures followed where one nation violates the sovereignty of another nation; moreover, neither the United Nations Charter nor the principles of International law *require* the return of the abducted person, particularly in the absence of a request by the State from which the person was abducted.** Indeed, as detailed in Whitman, *Digests of In-*

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* The United Nations resolution did not characterize the seizure of the ex-Nazi as an "illegal kidnapping" (500 F.2d at 277); and even the mild statement in the resolution was tempered by the Security Council's declaration that it was "[m]indful of the universal condemnation of the persecution of the Jews under the Nazis, and of the concern of people in all countries that Eichmann should be brought to appropriate justice for the crimes of which he is accused".

** As one commentator noted in discussing the Eichmann case, "Argentina could and did protest the apprehending of Eichmann on her soil, but not on behalf of the individual. The protest concerned sovereignty, ..." Cutler, *The Eichmann Trial*, 4 Canadian Bar Journal 352 (1961).

ternational Law, Vol. 5, pp. 212-213, the United States did not construe the term "adequate reparation" to require the return of Eichmann to his sanctuary:

> On June 22, 1960, the Foreign Minister of Israel (Golda Meir) inquired as to the meaning of "adequate reparation". On the following day, Henry Cabot Lodge, Representative of the United States, referred to the inquiry and stated:
>
> > "The United States considers that 'adequate reparation' will have been made by the expression of views by the Security Council in the pending resolution taken together with the statement of the Foreign Minister of Israel making apology on behalf of the Government of Israel. We therefore think that when we have adopted the pending resolution, 'adequate reparation' will have been made and that the incident will then be closed. The normal and friendly relations between the two Governments can then progress.
> >
> > "It is on this understanding of the meaning of this resolution that the United States yesterday stated its position". U.S.-U.N. press release 3421; XLIII Bulletin, Department of State, No. 1099, July 18, 1960, p. 116 . . . ."

And, of course, Eichmann was never returned to Argentina nor did Argentina ever request his return. Instead (id):

> [O]n August 3, 1960, a joint statement by the Argentine and Israeli Governments was issued simultaneously in Buenos Aires and in Jerusalem stating that the two Governments were "animated by the wish to comply with the resolution of the Security Council of June 23, in which the hope was expressed that the traditionally friendly relations between the two countries will be advanced", and announcing that

> the "incident"—referring to the dispute following the clandestine abduction of Adolph Eichmann from Argentine territory—between them was closed. The "incident" *closed* was described in the joint statement as arising "out of the action taken by Israeli nationals which infringed fundamental rights of the state of Argentina." There was no reference in the joint statement to the adequate or appropriate reparation which Argentina had demanded and which the Security Council had requested. New York Times, August 4, 1960, pp. 1, 3.

Thus the Eichmann case hardly establishes that "international kidnapping"—assuming an arrest of an individual to stand trial in the courts of a free society can be so characterized—"violates the United Nations Charter." Moreover, to the extent that the seizure of the appellant here may constitute a violation of international law, it affords no basis for the relinquishment of jurisdiction. *Cook* v. *United States*, 288 U.S. 102, 122 (1933).

CONCLUSION

There is no basis on the facts of this case to depart from the well-settled rule that "[a] writ of *habeas corpus* is not like an action to recover damages for an unlawful arrest or commitment, but its object is to ascertain whether the prisoner can lawfully be detained in custody; and, if sufficient ground for his detention by the government is shown, he is not to be discharged for defects in the original arrest or commitment.: *Nishimura Ekin* v. *United States*, 142 U.S. 651, 662 (1892); *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149 (1923); *United States ex rel. Orsini* v. *Reincke*, 286 F. Supp. 974, 978 (1968), affirmed on the district court opinion, 397 F.2d 977 (C.A. 2, 1968), *certiorari denied*, 393 U.S. 1050 (1969); see also, *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1971). Accordingly, the judgment of the District Court should be affirmed.

Dated: November 25, 1974

Respectfully submitted,

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

EDWARD R. KORMAN,
Chief Assistant United States Attorney,
(*Of Counsel*).

APPENDIX

APPENDIX A

United States District Court

EASTERN DISTRICT OF NEW YORK

73 Cr. 677

UNITED STATES OF AMERICA,

Plaintiff,

—against—

JULIO JUVENTINO LUJAN,

Defendant.

United States Courthouse
Brooklyn, New York
June 7, 1974
10:00 A.M.

Before: HON. JACOB MISHLER, *Ch. U.S.D.J.*

(2)

APPEARANCES:

DAVID G. TRAGER,
United States Attorney.

By: EDWARD KORMAN,
Assistant United States Attorney.

FRANK LOPEZ, Esq.,
Attorney for Defendant.

Appendix A

(3)

The Clerk: Criminal motion, U.S.A. v. Julio Juventino Lujan.

The Court: You say you're in a hurry to get someplace?

Mr. Lopez: I'm not but Mr. Justice Composto is.

The Court: On what basis do you say you're entitled to a dismissal?

I notice you cited U.S. against Toscanino.

Mr. Lopez: Your Honor, on January 19 we had a discussion on the record as far as this matter is concerned and your Honor suggested at that time, when Assistant United States Attorney Puccio was before the Court, that we await the determination in U.S. v. Toscanino.

The Court: The best you are entitled to under Toscanino, is a hearing to determine the participation of our enforcement agency as to bringing him into the country. Why do you ask for a dismissal?

Mr. Lopez: Yes, but I also ask for other and further relief as may be appropriate in the cause.

If you feel a hearing is indicated so we [4] can allege our claim and make proof of our claim, we are delighted to have such a hearing. I am perfectly satisfied with that.

The Court: I'm sorry to take Mr. Korman's argument away but we haven't heard the last of Toscanino yet, as I understand——

Mr. Korman: That's correct, your Honor——

The Court: (continuing) And when Toscanino is finalized—and I can't tell when it will be—whether a month or six months—I will then hold a hearing. But, it is your delay in asking for a hearing at this point——

Mr. Lopez: Right——

The Court: (continuing) And I don't expect you will use this delay as a basis for the motion to dismiss for vio-

lation of speedy trial rules because if you do that, what I'll do—I'll do what I did in Toscanino—I'll try the case.

Mr. Lopez: I'm trying to avoid that, because Toscanino is also mentioned in this indictment.

What I am going to do, I am going to seek an adjournment because of the Toscanino litigation [5] and I'll get a letter from the defendant consenting to this fact which I'll forward to your Honor with a copy to the United States Attorney.

If there's any flack from the defendant in this matter, then, we'll have to set a trial date at your Honor's convenience. I think that would be the best procedure.

Mr. Korman: Judge, as long as this is going to be delayed, I'd like to make a suggestion.

It's not at all clear to me, at least the decision in Toscanino is not at all clear to me, as to all of the circumstances under which the holding in that case would or would not apply and quite frankly, we would like to have this case up before the Court of Appeals at the same time as Toscanino is before it so that we could get a clarification of precisely what they're talking about.

The Court: You want a different panel?

Mr. Korman: Oh, no, not a different panel. We're going to move for——

The Court: I mean in this case.

Mr. Korman: No, no.

I've asked for permission, at least [6] preliminarily, from the Solicitor General, to not only take an immediate appeal in this case but ask that it be heard en banc along with Toscanino and let me point out the reasons why I think having this case up there will provide further clarification of the holding in Toscanino.

Appendix A

At page 3509 of the slip opinion, the Court of Appeals says that:

> "If the charges of Government misconduct in kidnapping Toscanino and forcibly bringing him into the United States should be sustained, the foregoing principles would, as a matter of due process, entitle him to some relief.
>
> "The allegations include corruption and bribery of a foreign official as well as kidnapping accompanied by violence and brutality to the person.
>
> "Deliberate misconduct on the part of the United States agents in violation of not only constitutional provisions but also the Federal Kidnapping Act and of two international treaties obligating the United States Government to respect the territorial sovereignty of Uruguay is charged."

[7]

Now, there are a number of distinctions, just in reading that and putting that alongside the allegations in this motion.

There is no charge of brutality or that the Bolivian authorities were acting outside the scope of their authority and under the circumstances there could not possibly be any violation of the United Nations Charter or the O.A.S. Charter.

• • • • •

So, what you have here are allegations that are basically similar to United States against Sobell in which he simply alleged that the Mexican authorities, acting at the behest of American authorities, abducted him into the United States and the Court of Appeals then distinguished Sobell on the ground that he didn't allege a violation of the United Nations Charter.

Appendix A

[8]

In my own judgment there are substantial differences and it is not at all clear to me what role each of these factors played in the ultimate decision of the Court of Appeals and since we are going to have a delay anyway, and I am prepared to say that we will file a notice of appeal today and docket the record today and file our brief within two weeks, in the Court of Appeals, we can make use of this period of time to obtain clarification from the Court of Appeals as to the scope of their holding in Toscanino.

The Court: Well, there were other subtle suggestions I thought another case might present to the Court of Appeals that might further clarify Toscanino but I felt as a practical matter a hearing might be required because as you know, the opinion suggested two things. First, hold a hearing on these allegations and then, at the end of the opinion, indicating that I need not, if the defendant didn't bring forth some support for the general allegations and in effect, directing that the defendant be more specific and have something more than general allegations for a hearing.

[9]

Mr. Korman: But only in response to a Government denial is what the opinion says and I'm not prepared at this time to submit a Government denial of the allegations.

Mr. Lopez: There's no allegation on the part of Lujan as far as brutality but if there's any decision as far as this matter is concerned, I would like to have the opportunity to present the defendant's affidavit with regard to a factual allegation of everything that happened.

What we have here is my affidavit and if this, by any means, is going to be reviewed by the second circuit I think we should go up on a complete record and the factual allegations of the defendant himself.

The Court: Well, if the Government doesn't challenge your right to make an affidavit and the defendant would say no more than you say, what would the affidavit add to the record?

Mr. Lopez: I want to make sure it is understood—two things: That the Bolivian authorities advised Lujan they were not arresting him or detaining him on any charges on a violation [10] of the Bolivian law but were operating exclusively at the request of the F.B.I. or American operatives.

The Court: I don't think Mr. Korman would object to that statement going in as part of your demand.

Mr. Korman: Without conceding the truth of it.

The Court: Of course, without conceding the truth of it—because, as I heard what you said, that this is no more than Sobell, where the American authorities demanded the defendant and you're saying the same thing—not violent in any way but initiated by the request—I mean not accompanied by any violence or brutality—but a request for Mr. Lujan's presence to answer charges and that he was somehow delivered into the hands of the Government officials.

Is it of any significance to have the Government's position of any argument in this case as to how he was conducted to the American officials or whether the American officials paid the Bolivian authorities for their services?

Mr. Korman: I don't know how to answer that question—whether it's significant to the [11] Government's position. How precisely they obtained the acquiescence of the Bolivian authorities, as long as the Bolivian authorities were acting as agents of that government——

The Court: I want to be helpful but I am afraid if you go up on too narrow a ground just that in those cases

where the Government requests the presence and they are delivered without formal demand, it's not going to be too helpful with the definition of "out of bounds" in Toscanino.

Mr. Lopez: Well, your Honor——

The Court: Let Mr. Korman answer that.

Mr. Korman: Again, it's a lack of clarity in the opinion.

For example, there was nothing more than that in Sobell and yet the Court indicated that Sobell would be decided differently today.

The Court: I would like to see the file so I know what Mr. Lopez said in his affidavit.

Mr. Korman: There's one more ground I want to preserve so it will not be said that we waived it.

Assuming that Toscanino was ever held to [12] be applicable to the facts in this case, we would argue that the holding in Toscanino, since it makes a clear change in the law, should not be applied retroactively to any case in which the conduct there prescribed took place prior to the holding in that case.

The Court: So, that would distinguish it——

Mr. Korman: I don't press that here but if it should ever be held I want it clear that I'm not waiving that.

Mr. Lopez: I understand that he's not waiving that right. It would have to be argued.

Another thing that I think should be brought to the Court's attention is that if it requires proof that there are extradition treaties between the United States and Argentina and the United States and Bolivia——

The Court: What was that?

Mr. Lopez: If there are in existence and were at the time of Lujan's detention, valid extradition treaties in some form between the United States and Argentina and the United States and Bolivia——

[13]

The Court: Well, Mr. Korman may——

Mr. Korman: Your Honor, there are all those documents which are a matter of public record and any Court can take judicial notice of them.

The Court: These papers were not filed, Mr. Lopez, because you sent them to me but they'll be filed immediately.

So, the pertinent information is found on page 5 of the——

Mr. Korman: And 5, your Honor.

The Court: Beginning at page 5.

Mr. Korman: Yes.

The Court: All right. Here is your statement:

> "(C) On or about November 1st, 1972, Lujan was taken by Bolivian police and American C.I.A. agents or operatives in Bolivia, to the airport where he was forcibly abducted and placed on an airplane and taken to New York."

Does that add anything to the defendant's claim—"forcibly abducted and placed on an airplane"?

[14]

It doesn't say who forcibly abducted him and forcibly placed him on a plane. Do you think it would make a difference in the Government's case if it said "American agents then forcibly abducted him" which might indicate forcibly out of Bolivian hands?

Mr. Korman: I understood the thrust of this allegation to be that both the C.I.A. and Bolivian police, together, put him on the plane—together.

Mr. Lopez: That's right—together.

The Court: Joint action.

* * * * *

The Court: Did we further define that "(C)"? Mr. Korman, are you satisfied that you understand——

Mr. Korman: Yes.

The Court: Now, when you say "acting [15] covertly" —I refer to (E)—would you further define that and say how the defendant claims the United States law enforcement officers acted covertly with the Bolivian police?

Mr. Lopez: It's the defendant's position in this case that a person by the name of Duran was cooperating with the American agents and that he hired Lujan's plane on a legal flight from Argentina to Bolivia which cleared customs and it was a lure to get him into Bolivia. Once he arrived there——

The Court: Who is Duran?

Mr. Lopez: Duran, according to information and belief, is a person who goes to Lujan, in Argentina, and says "I want to rent your plane"—he's a licensed pilot— "I want you to take me to Bolivia. I have some work there with the U.S. authorities in the U.S. involving mines."

The Court: You're saying the United States supplied the money to send him to Bolivia?

Mr. Lopez: I have no actual proof—but that's the inference—I have no actual proof as we are not privy to that kind of transaction.

The Court: Now you are beyond just a simple request. [16]

Mr. Korman: I don't mind having that—again, without admitting the truth of it.

The Court: So, the defendant's position would be that United States money was paid to Duran and it was the United States' plan or design—and they knew that Duran was going into——

Mr. Lopez: Bolivia——

The Court: (continuing) From Argentina——

Mr. Lopez: Argentina to Bolivia——

The Court: Yes—to induce Mr. Lujan to take the plane into Bolivia where he was then taken by Bolivian police.

Mr. Lopez: Yes.

Appendix A

I want to make clear that Lujan's allegations and the thrust of his application doesn't involve either the torture or terror we find in Toscanino and doesn't involve, to our knowledge at this time, any electronic wiretapping or eavesdropping illegal or otherwise. We make no such allegation. We have no facts of that.

Thirdly your Honor, as far as Lujan is concerned, we make no claim as far as custodial interrogation of any kind—those long hours of [17] interrogation that were the fact pattern, at least, on affidavit, in Toscanino.

The thrust of Lujan's application is the deceit and trickery to lure him to Bolivia—the United States' plan and the cooperation between the Bolivian police and the American operatives. But, what we don't know—but if we're going up this way, the allegation would then be made that the Bolivian police acted without authority—but we have no proof.

The Court: Let's assume they are acting without formal charges and in violation of Bolivian law.

Mr. Korman: Okay.

Mr. Lopez: Right.

The Court: Now, I think we have it.

Mr. Lopez: And of course, there were extradition treaties in Argentina and Bolivia where a person could be extradited.

Mr. Korman: Extradition treaties speak for themselves.

The Court: I thought you said extradition treaties between this country and Bolivia?

Mr. Lopez: Right—also Argentina.

[18]

The Court: Right.

Now, I think we have the facts which form the basis for the defendant's claim of lack of jurisdiction and you are demanding a hearing and based on that claim, a hear-

ing is denied and the motion to dismiss the complaint for lack of jurisdiction is denied.

* * * * *

[23] * * *

On the other hand, Lujan might very well help fix the parameters of Toscanino so with that in mind, I will do what I thought I would never do and which I am doing for the first time—dismissing the indictment in United States against Lujan on the ground that the Court obtained the presence of the defendant through the connivance and trickery of the Government, as specifically set forth in the statement of facts in the affidavit of Mr. Lopez as explicated by his statement on the record here today and with the distinct understanding that the defendant Julio Juventino Lujan be continued on bail in the amount fixed and upon the terms and conditions fixed pending the outcome of the appeal and until the appeal is final.

* * * * *

APPENDIX B

(Notice of Motion for Reargument)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 677

UNITED STATES OF AMERICA

—against—

JEAN PAUL ANGELLETTI, et al.,

Defendants.

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of Edward R. Korman, Chief Assistant United States Attorney for the Eastern District of New York and upon all the proceedings heretofore at herein, the United States of America will move this Court before the Honorable Jacob Mishler, Chief Judge, at the United States Courthouse, 225 Cadman Plaza East, Brooklyn, New York, on the 21st day of June 1974 at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard for an order granting reargument herein and for a further order vacating the order herein dismissing the indictment and for such other and further relief as this Court deems just and proper.

(Notice of Motion for Reargument)

Dated: Brooklyn, New York
June 17, 1974

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for United States of America
225 Cadman Plaza East
Brooklyn, New York 11201

(Signed By): EDWARD R. KORMAN

EDWARD R. KORMAN
Chief Assistant U.S. Attorney

To: CLERK
United States District Court
Eastern District of New York

FRANK A. LOPEZ, Esq.
31 Smith Street
Brooklyn, New York 11210

Affidavit of Edward R. Korman

Appendix B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

73 Cr. 677

UNITED STATES OF AMERICA

—against—

JEAN PAUL ANGELLETTI, et al.,

Defendants.

STATE OF NEW YORK)
COUNTY OF KINGS) ss.:
EASTERN DISTRICT OF NEW YORK)

EDWARD R. KORMAN, being duly sworn, deposes and says:

1. I am the Chief Assistant United States Attorney for the Eastern District of New York, duly sworn according to law and acting as such. I make this affidavit in support of the within motion of the United States of America for reargument of the motion of the defendant Julio Juventino Lujan to dismiss the indictment herein, which motion was orally granted by the District Court on June 7, 1974, and for an order vacating the said dismissal and reinstating the indictment.

2. On June 7, 1974, an oral order was entered dismissing the indictment in the above-captioned case on the authority of *United States* v. *Toscanino*, — F.2d — (slip opinions, 3493, May 15, 1974). Although the District Court

was of the view that a dismissal was not warranted, and was reluctant to dismiss the indictment, both parties felt that was the best procedure to obtain a prompt determination of the applicability of the holding in *Toscanino* to the somewhat different facts in this case. Accordingly, the indictment was dismissed, and the United States filed a notice of appeal on the same day.

3. After carefully studying the opinion in *Toscanino* while working on the petition for rehearing *en banc,* the Government concluded that it erroneously counseled the dismissal of the indictment. Under the holding in *Toscanino*, as the Government understands it, the defendant would not, under any circumstances be entitled to a dismissal of the indictment. The indictment, which was handed up prior to his seizure, is perfectly valid and there would seem to be no reason why a defendant properly brought before this Court could not be brought to trial.

4. The Government believes that the remedy which the defendant should have sought is a petition for a writ of habeas corpus pursuant to Section 2241 of Title 28 of the United States Code alleging that he is "in custody in violation of the Constitution or laws or treaties of the United States", and seeking an order directing his release and return to Argentina. An order denying such an application could then be appealed to the Court of Appeals pursuant to Section 2253 of Title 28 of the United States Code. Such a disposition would also be in keeping with the expressed view of this Court that the defendant is not entitled to any relief and would provide an equally expeditious procedure for determining the applicability of *United States* v. *Toscanino, supra.*

Appendix B

(Affidavit of Edward R. Korman)

5. Attached hereto as Exhibit A is a copy of a stipulation between the attorneys for the parties withdrawing the notice of appeal filed herein on June 7, 1974.

WHEREFORE, it is respectfully requested that the motion for reargument herein be granted and that this Court's order of June 7, 1974 be vacated and the indictment ordered reinstated as against the defendant Julio Juventino Lujan.

Dated: Brooklyn, New York,
June 17, 1974.

(Signed) EDWARD R. KORMAN

EDWARD R. KORMAN
Chief Assistant
United States Attorney.

Sworn to before me this
17th day of June 1974.

(Signed) FRANCES A. GRANT

FRANCES A. GRANT
Notary Public, State of New York
No. 41-4503731
Qualified in Queens County
Commission Expires March 30, 1975

APPENDIX C

(Judgment)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

74 C 928

UNITED STATES OF AMERICA, ex rel. JULIO JUVENTINO LUJAN on the petition of FRANK A. LOPEZ,

Petitioner,

—against—

WARDEN LOUIS GENGLER, Superintendent Federal Detention Headquarters, New York City, HON. DAVID G. TRAGER, United States Attorney for the Eastern District of New York, and any other person having custody and control of the relator,

Respondents.

An Order of Honorable Jacob Mishler, United States District Judge, having been filed on June 21, 1974, finding for the respondent and against the petitioner, it is

ORDERED and ADJUDGED that the petition for a writ of habeas corpus is dismissed.

Dated: Brooklyn, New York
June 24, 1974

LEWIS ORGEL,

Clerk.

By: .....

Chief Deputy Clerk

APPENDIX D

(Warrant for Arrest of Defendant)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK
73 Cr. 677

UNITED STATES OF AMERICA

—against—

JEAN PAUL ANGELLETTI, et al.,

Defendants.

To [1] Any Special Agent of the Drug Enforcement Administration, and/or to any United States Marshal or any Deputy United States Marshal

You are hereby commanded to arrest Julio Juventino Lujan and bring him forthwith before the United States District Court for the Eastern District of New York in the city of Brooklyn, N.Y. to answer to an indictment charging him with conspiracy prior to May 1, 1971 to import and bring into the United States and to receive, conceal, buy, sell and facilitate the transportation, concealment and sale of a large quantity of heroin, a narcotic

[1] Insert designation of officer to whom the warrant is issued, e.g., "any United States Marshal or any other authorized officer"; or "United States Marshal for the Eastern District of New York"; or "any United States Marshal"; or "any Special Agent of the Federal Bureau of Investigation"; or "any United States Marshal or any Special Agent of the Federal Bureau of Investigation"; or "any agent of the Alcohol Tax Unit."

Appendix D

(Warrant for Arrest of Defendant)

drug; conspiracy on and after May 1, 1971 to import, distribute and possess with intent to distribute a large quantity of heroin, a Schedule I narcotic drug controlled substance in violation of Title 21, United States Code, §§ 173, 174, 846 and 963.

Dated at Brooklyn, New York on July 19, 1973

LEWIS ORGEL,

Clerk.

By: .....

Deputy Clerk.

AFFIDAVIT OF MAILING

STATE OF NEW YORK
COUNTY OF KINGS } ss
EASTERN DISTRICT OF NEW YORK

LYDIA FERNANDEZ

deposes and says that he is employed in the office of the United States At
District of New York.

That on the 27th day of November 19 74 he served two c
Brief and Appendix for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Frank A. Lopez, Esq.
31 Smith Street
Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the sa
drop for mailing in the United States Court House, Washington Street, Borou
of Kings, City of New York.

Lydia Fer
LYDIA FERNANDEZ

Sworn to before me this
27th day of November 19 74

OLGA S. MORGAN
Notary Public, State of New York
No. 24-5019966
Qualified in Kings County
Commission Expires March 30, 19

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★ U. S. Government Printing Office 1974— 614—244—49